Florida House of Representatives

Committee on Claims
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Review of House and Senate Claim Bill Procedures

Policy Options for Legislative Consideration

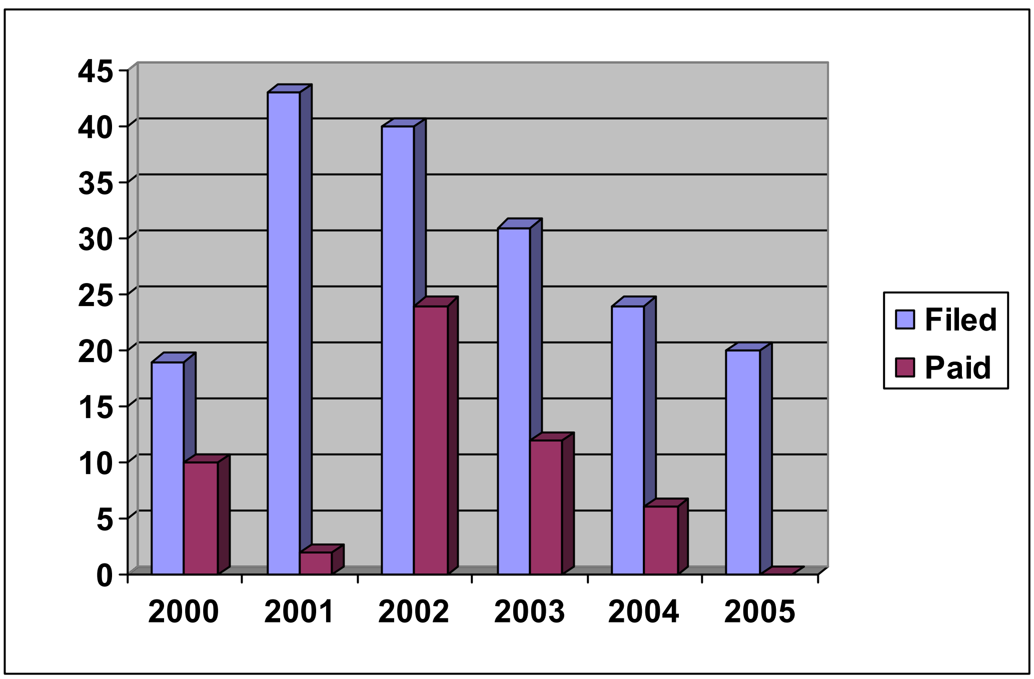
The Claim Bill Process

A claim bill, sometimes called a relief act, is a bill that compensates a particular individual or entity for injuries or losses occasioned by the negligence or error of a public officer or entity. It is a means by which an injured party may recover damages even though the public officer or agency involved may be immune from suit pursuant to the constitutional doctrine of sovereign immunity.

Generally, a claimant who seeks to enforce either a judgment or a settlement agreement against a governmental entity for a tort action[1] (typically negligence or wrongful death) in an amount that exceeds the statutory caps[2] requests a Member of the Legislature to file a claim bill. Once filed, the presiding officers each appoint a Special Master to review the claim via a hearing and report back to the body. Claims which are reported unfavorably are typically withdrawn by the sponsor, though the Legislature is not bound by the recommendation of the Special Master. Once a recommendation is made, the bill proceeds through each chamber's committee process. After final passage, the bill is either signed by the Governor, vetoed, or allowed to become law without his signature. Once the act becomes a law, the government entity is required to pay the award pursuant to the terms of the law.

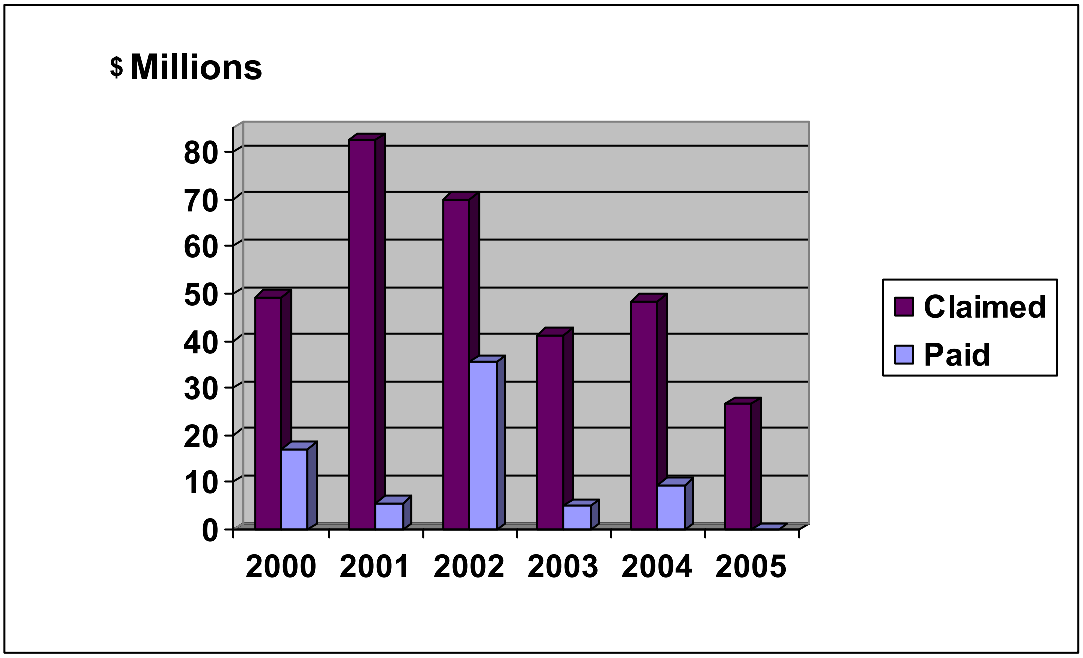
Historically, the passage rate for all types of claim bills over the past 10 years has declined.

Number of Claim Bills Filed and Paid per Year

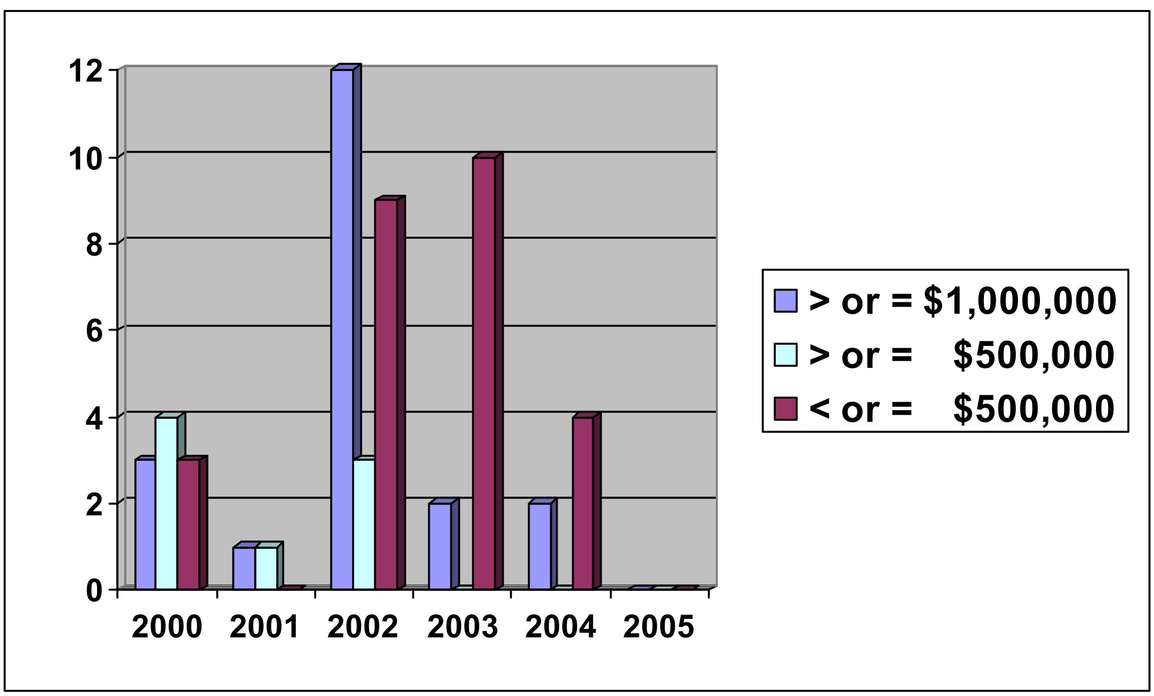


[1] A tort claim is private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages. Black's Law Dictionary (5th Edition 1979).
[2] See s. 768.28, F.S., and discussion under "Sovereign Immunity."

Amount of Total Claims Paid Per Year (2000 – 2005)

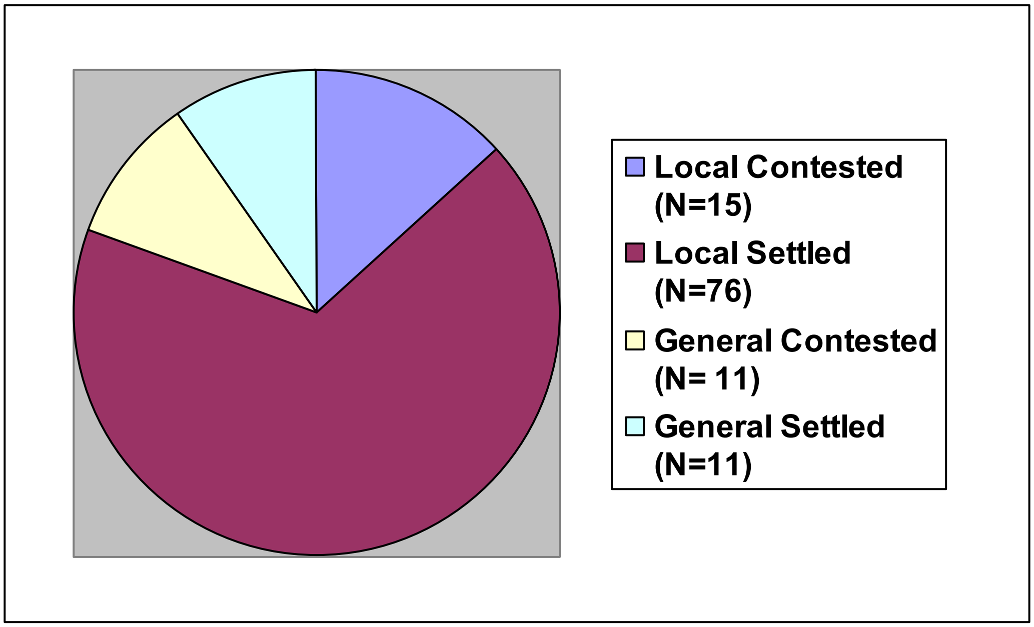


Dollar Amounts of Individual Claims Paid (2000 – 2005)



Regardless of the declining passage rate, it is clear that local, settled claim bills have the highest passage rate.

Number of Passed Claim Bills (1996 – 2005)



Typically, the Legislature's policy on handling claim bills stems from policy decisions regarding the extent of the waiver of sovereign immunity; whether it is appropriate to waive immunity at all, and if so, in what circumstances. Other policy considerations concern how an award is divided between the claimant, their attorney, and their lobbyists.

This report examines historical data regarding the passage of claim bills, and analyzes several specific issues including the expedited review of settled claims, the statutory caps on liability, and the application of the statutory attorney's fee limits to lobbying fees. Lastly, this report suggests various policy options that might be considered in future discussions regarding the claim bill process.

Sovereign Immunity

Sovereign immunity is a doctrine that prohibits suits against the government without the government's consent. The Florida Constitution addresses sovereign immunity in Article X, section 13 as follows:

> Suits Against the State.—Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

In 1973, the Florida Legislature enacted section 768.28, F.S. This section provides that the state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances. Sovereign immunity extends to all state agencies or subdivisions of the state, which by statutory definition includes the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority.[3] Liability does not include punitive damages[4] or interest for the period before judgment.

The statute imposes a $100,000 limit per person, and a $200,000 limit per incident, on the collectability of any tort judgment based on the government's liability. These limits do not preclude plaintiffs from obtaining judgments in excess of the statutory cap; however, plaintiffs cannot force the government to pay damages that exceed the recovery cap. Florida law requires a claimant to petition the Legislature in accordance with its rules, to seek an appropriation to pay a judgment against the state or state agency.[5] In fact, the legislative appropriation is the sole method to compensate a tort claimant in an amount that exceeds the caps,[6] and such act is considered a matter of legislative grace.[7]

It is important to note that the limited statutory waiver of sovereign immunity does not waive the state's immunity from suit in federal court, as such immunity is guaranteed by the Eleventh Amendment to the Constitution of the United States.[8]

Comparison of House and Senate Rules

Both the House and the Senate have distinct rules governing the procedures regarding claim bills. The rules of each chamber are adopted biannually, and can be amended by the adoption of a report recommended by the Rules and Calendar Council by a majority vote.[9] The House generally addresses claim bills in Rule 5.6 of the Rules of the Florida House of Representatives (2004-2006), and the Senate generally addresses claim bills in Rule 4. 81, Rules of the Florida Senate (2004-2006).

Joint Rules apply to both the House and the Senate, and are adopted by concurrent resolution. Joint Rules continue in effect from session to session or Legislature to Legislature until repealed by concurrent resolution.[10] The Joint Rules address such subjects as lobbyist registration and reporting, the review period for the general appropriations bill; legislative support services; the Joint Legislative Auditing Committee; the Auditor General; the Office of Program Policy Analysis and Government Accountability (OPPAGA); and the Joint Legislative Budget Commission. The Joint Rules do not currently address the handling of claim bills.

See Appendix A for a comparison of House and Senate Rules regarding the treatment of claim bills.

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[3] Section 768.28(2), F.S.
[4] Punitive damages are distinguished from compensatory damages in that punitive damages are intended to punish the defendant for a wrong aggravated by violence, malice, fraud, or wanton or wicked conduct on the part of the defendant. Black's Law Dictionary (5th Edition 1979). In Florida, a non-government defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. Section 768.72, F.S.
[5] Section 11.066, F.S.
[6] Notwithstanding the limited waiver of sovereign immunity provided by statute, the government may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action of the Legislature, but the government shall not be deemed to have waived any defense of sovereign immunity or to have increased the limits of its liability as a result of obtaining insurance coverage for tortuous acts in excess of the statutory caps. Section 768.28(5), F.S.
[7] See Gamble v. Wells, 450 So.2d 850, 852 (Fla. 1984).
[8] Section 768.28(18), F.S.
[9] See Rule 13.3 of the Rules of the House of Representatives (2004-2006), and Rule 11.3 of the Florida Senate (2004-2006). Note that the Senate refers to its Committee on Rules and Calendar.
[10] See Joint Rule 8.1 of the Joint Rules of the Florida Legislature (2004-2006).

Analysis of Specified Issues

Statutory Caps on Liability

The statutory caps on liability were established in 1973, and last increased in 1981 to prohibit the collection of more than $100,000 per person and $200,000 per incident against the government without Legislative approval.[11] Since 1981, 4 attempts have been made to increase or remove the caps, none successful. Adjusted for inflation, the caps as of June, 2005 would be $207,810 per person and $415,621 per incident.[12]

It has been suggested that increasing the statutory caps on liability would decrease the number of claim bills coming before the legislature, under the assumption that more claims would be payable without the need for Legislative approval. This assumption is only true if it is assumed that the caps are perceived by litigants as a ceiling on government liability, rather than a floor.

The State of Florida Division of Risk Management (hereinafter referred to as "the Division")[13] is responsible for administering a state self-insurance fund to provide insurance for general liability (and other types of claims) in proceedings against the state.[14] In fiscal year 2003-2004, the Division reported that 1,485 general and automobile liability claims were paid,[15] totaling $8,928,098.[16] The average cost per claim was $6,012.[17] Over the 3 year period from 2003-2005, the Division of Risk Management paid 99% of the liability claims determined to be meritorious.[18]

Note that information is unavailable to determine how many claims against local government entities were settled within the statutory limits. Several states have caps that are lower for local governments than the caps for claims against the state.[19]

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[11] See ch. 81-317, L.O.F.

[12] As calculated by staff of the Finance and Tax Committee of the Florida House of Representatives on June 9, 2005. Using a CPI for all Southern urban consumers, the caps would be $205,181 per person and $410,363 per incident.

[13] The State of Florida Division of Risk Management is administratively housed under the Office of the Chief Financial Officer. The mission of the Division is to ensure that participating State agencies are provided quality workers' compensation, liability, federal civil rights, auto liability, and property insurance coverage at reasonable rates by providing self-insurance, purchase of insurance, claims handling, and technical assistance in managing risk. 2003-2004 Annual Report of the State of Florida Division of Risk Management.

[14] Section 284.30, F.S.

[15] 2003-2004 Annual Report of the State of Florida Division of Risk Management, p. 17. Paid claims in fiscal year 2003-2004 occurred in fiscal year 1999-2000 and have had 4 years of claim development ending on June 30, 2004.

[16] Id. at p. 17.

[17] Id. at p. 17.

[18] Data provided by Division of Risk Management.

[19] New Hampshire has caps of $150,000/$500,000 for local claims and $250,000/$2 million for state claims; see N.H. Revs. Stat. Ann. Section 541-B:14 and 507-B:4. Pennsylvania provides a $500,000 cap for local claims and a $250,000/$1 million cap for claims against the state; see Pa. Stat. Ann. 42 ss. 8553 and 8528.

Policy Options Regarding Sovereign Immunity Caps

1. **Maintain the existing statutory caps (do nothing). Currently 99% of the claims against the state are being paid within the statutory limits.[20]**

2. **Increase the statutory caps for local and state claims.**

   Policy Arguments in Favor of Increasing the Caps:

   - ❑ **Fairness: keeps up with inflation.**
   - ❑ **Gives local government more flexibility in settling claims against them.**

   Policy arguments Against increasing the caps:

   - ❑ **May drive up the cost of insurance or self-insurance for local governments.**
   - ❑ **Rather than increasing the ceiling, increasing the caps might have the unintended consequence of moving the floor: claimants who would have settled for the old (lower) cap amounts in order to avoid trial will now settle for the higher cap amounts.**
   - ❑ **Not necessary, as the number of claim bills filed has declined over time.**

3. **Increase the caps for claims against state entities, but retain current caps against local governments.**

   Policy Arguments in Favor of Creating Differentiated Caps:

   - ❑ **May decrease the number of claim bills.**
   - ❑ **Would expedite the process for claimants.**

   Policy Arguments Against Creating Differentiated Caps:

   - ❑ **Treats claimants differently based on which government entity employed the defendant.**
   - ❑ **Unfair to protect local governments, but not the state government from inflation.**
   - ❑ **Could be subject to equal protection challenges.[21]**

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[20] Percentage extrapolated using 1,485 claims paid by the Division of Risk Management in 2003-2004, and 8 general claims filed in 2003 and 2004, for a total of 1493 general claims.

- ❑ **Decreases legislative control over payment of claims between the current cap and the new cap.**

4. Eliminate the statutory caps and provide total immunity for the government.

Policy Arguments in Favor of Eliminating the Limited Waiver of Immunity:

- ❑ **Protects public funds.**

- ❑ **Allows government to operate without threat of suit.**

Policy Arguments Against Eliminating the Limited Waiver of Immunity:

- ❑ **Could be subject to constitutional access to courts challenges.[22]**

- ❑ **Fails to deter wrongful conduct by government officials.[23]**

- ❑ **Limits public knowledge of government improprieties.[24]**

Expedited Review of Settled Claims

Both House and Senate Rules provide that the hearing and consideration of claim bills shall be held in abeyance until all available administrative and judicial remedies have been exhausted, except where the parties have executed a written settlement agreement.[25] As a general matter, settled claim bills have a much higher rate of passage than contested claims.

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[21] Equal protection rarely becomes an issue unless state action impacts a suspect class or fundamental right. When no suspect class is disturbed, and when no fundamental rights or liberties are violated, the Equal Protection Clause "is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." Detecting Constitutional Problems in Florida Legislation - 2000, published by the Civil Justice Council of the Florida House of Representatives, p. 52, citing McGowan v. Maryland, 366 U.S. 420, 425 (1961). The Florida Supreme Court has upheld the application of the statutory caps on municipal liability in s. 768.28(5), F.S., and stated that s. 768.28 furthers the philosophy of Florida's present constitution that all local governmental entities be treated equally, and that in Florida, sovereign immunity should apply equally to all constitutionally authorized governmental entities and not in a disparate manner. Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981).

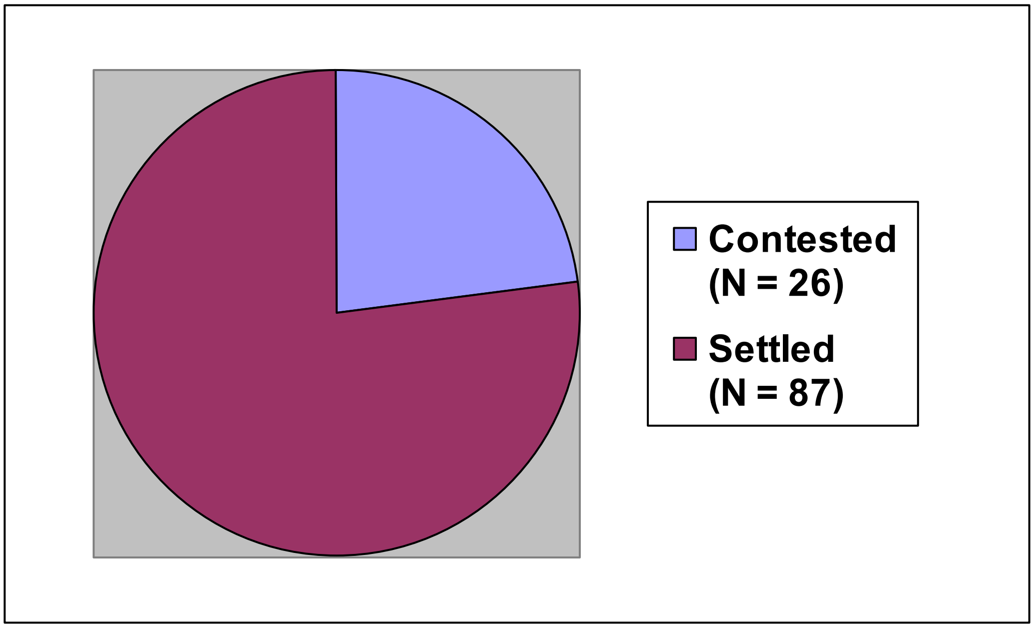
[22] Article 1, section 21 of the Florida Constitution provides that, "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay." Where citizens have enjoyed a historical right of access to the courts, the Legislature can only eliminate a judicial remedy under two circumstances: a valid public purpose coupled with a reasonable alternative, or an overriding public necessity. An argument could be made that the provisions of Article X, section 13 of the Florida Constitution, which authorizes the Legislature to enact general laws regarding suits against the state, might be viewed as an exception to the access to courts provisions, if the Legislature chose to enact total immunity. The Florida Supreme Court has held that since there was no historical right to recover for a municipalities negligence, the case law standard established for legislative elimination of causes of action was not applicable to the statutory limitation of liability. Cauley v. City of Jacksonville, 403 So.2d 379 (Fla. 1981).

[23] Gerald T. Wetherington and Donald I. Pollock, *Tort Suits Against Government Entities in Florida*, 44 Fla. L.Rev. 1, 8 (1992).

[24] Id at p. 28.

[25] See Rule 5.6(c), Rules of the Florida House of Representatives (2004-2006) and Rule 4.81(6), Rules of the Florida Senate (2004-2006).

Settled v. Contested Claim Bills Passed (1996 – 2005)



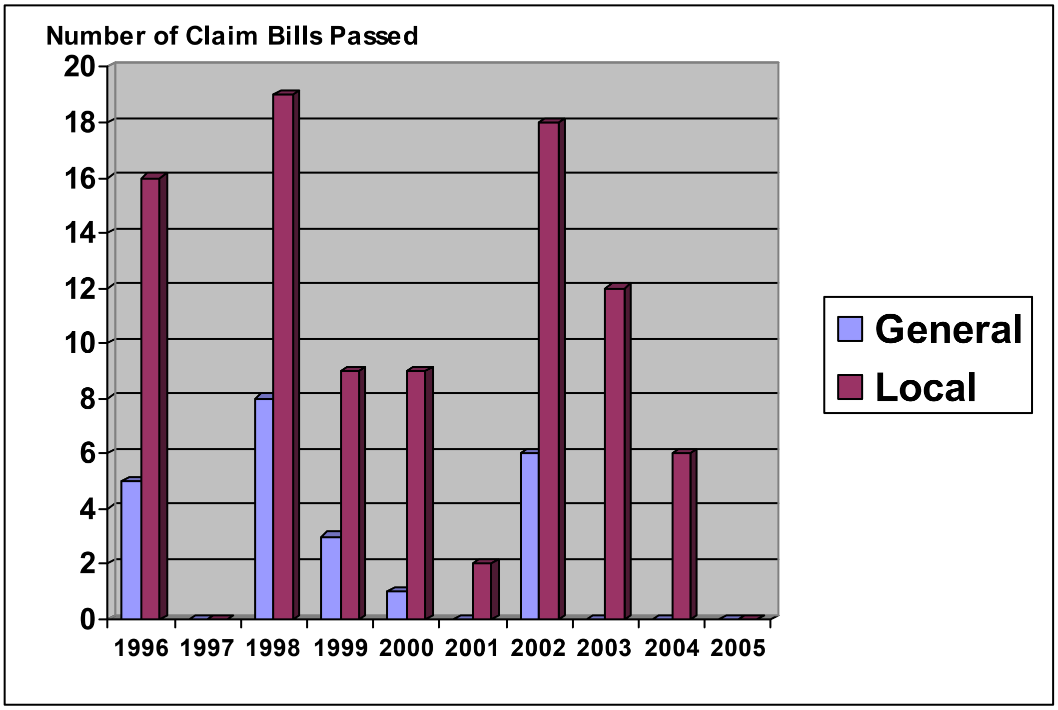
There are two types of settled claims that are presented to the Legislature for payment: local claims and general claims.

Local, settled claims

A local or special law is any legislative act that: 1) applies to an area or entity that is less than the total population of the state; and 2) contains subject matter that entitles those to whom it is applicable to the publication of notice or referendum required by the Constitution.[26] Generally, if the respondent is a county, municipality, school board, district, local constitutional officer, or other subdivision of the state, then the claim is a local bill. **Typically, local claim bills are funded by the local entity (the respondent), not by general revenue.** Historically, a higher percentage of local, settled claim bills pass both houses of the Legislature than do claim bills of any other type.

[26] *See* Art. III, s. 10, Fla. Const.

General v. Local (1996 – 2005)



Notwithstanding the limited waiver of sovereign immunity provided by statute, a government entity can agree, within the limits of insurance coverage provided, to settle a claim made or judgment rendered against it without any further act of the Legislature, but the government entity will not be deemed to have waived any defense of sovereign immunity or to have increased its limits of liability as a result of obtaining insurance coverage in excess of the statutory caps.[27] By statute, government entities are authorized to be self-insured, to enter into risk management programs, or to purchase liability insurance for whatever coverage they choose, or to have any combination thereof, in anticipation of any claim.[28] Government entities that are subject to homogeneous risks may purchase insurance jointly or may join together as self-insurers to provide other means of protection against tort claims.[29]

It is not clear whether the authority to settle claims within the limits of insurance coverage provided extends to government entities with self-insurance. Clearly government entities are statutorily authorized to be self-insured,[30] but the Legislature did not include the word "self-insurance" in the language allowing settlements without further Legislative act. Thus it might be concluded that the Legislature, in enacting section 768.28(5), F.S., allowing government entities to settle claims within the limits of insurance coverage provided without further act of the Legislature, intended to exclude government entities that self-insure.[31]

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[27] See s. 768.28(5), F.S.
[28] See s. 768.28(15) (a), F.S.
[29] See id.
[30] See id.
[31] *Expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) is a canon of statutory construction. Thus, where a statute enumerates certain criteria, applications, or exceptions, it is generally interpreted to exclude all items not listed. *See Thayer v. State*, 335 So. 2d 815 (Fla. 1976).

The Florida Supreme Court shed some light on the issue by reasoning that self- insurance is not the equivalent of commercial insurance because self-insurance does not spread or share the risk. The Supreme Court found thus:

> A necessary element of insurance is distribution of risk. Under [the self-insurance] plan, no premium is paid, no second party assumes the risk and no distribution of risk is accomplished.... The policy considerations behind our holdings of immunity waiver to the extent of liability insurance coverage may be stated thusly: the premium has been paid, the coverage has been extended, so it must have been intended that the benefits be paid. No such policy considerations exist here.[32]

However, current practice reveals that some local government entities that self-insure do so as members of a consortium and pay rates based on actuarial reports that determine the particular member's loss history. These "pools" insure the entity up to a specified amount, and then the consortium purchases insurance for the excess (re-insurance).[33] Thus in these circumstances, a premium is paid, the consortium assumes the risk and the risk is distributed among the participating members. It would appear that government entities that self-insure under this model might be considered as having purchased the equivalent of insurance for purposes of the ability to settle claims above the statutory caps without further legislative act.

By contrast, there are other government entities that self-insure by putting funds aside in a "rainy-day fund." These entities do not distribute risk or pay a premium. Thus it would appear that local government entities that self-insure in this manner have not purchased insurance for the purposes of the ability to settle claims above the statutory cap.

There are also government entities that purchase "claim bill insurance." By definition, this insurance only covers amounts owed by local governments in the event of the passage of a claim bill or relief act. As this type of insurance only pays out after passage of a claim bill, it would appear that such coverage would not allow local governments to settle claims without further act of the Legislature.

"Self-insurance" has been defined by the Legislature relative to other subjects. The term "self-insurance fund" is defined in the Florida Statutes relative to the Insurance Code as a group of members operating individually and collectively through a trust or corporation created for the purpose of pooling and spreading liabilities of its group members in any commercial property or casualty risk or surety insurance.[34] However, governmental self-insurance pools created pursuant to s. 768.28(15), F.S., are not considered commercial self-insurance funds.[35]

Policy Options Regarding Local, Settled Claims:

1. **Consider self-insurance pools in which the risk is shared as the statutory equivalent of insurance for the purposes of allowing local governments to settle their claims within the amount of insurance provided without legislative approval.**

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[32] *Hillsborough County Hospital and Welfare Board v. Taylor*, 546 So.2d 1055, 1057 (Fla. 1989) (quoting *Ponder v. Fulton-DeKalb Hospital Authority*, 353 S.E.2d 515, 517 (Ga. 1987)). Note that s. 286.28(2), F.S., which provided that waiver of sovereign immunity automatically took place up to the limits of a contract for insurance, was repealed in 1987 by ch. 87-134, L.O.F.

[33] The Florida School Board Insurance Trust Fund and the Florida Sheriff's Self-Insurance Trust Fund both work this way according to conversations with staff held in October and November, 2002.

[34] *See* s. 624.462, F.S.

[35] *See* s. 624.462(6), F.S.

Policy Arguments in Favor of Expanding the Definition of "Insurance" to include specified self-insurance pools:

- ❑ **Recognizes the autonomy of local governments.**
- ❑ **Might decrease the number of claims bills filed.**
- ❑ **Expedites the process for those claimants who do settle their claims.**

Policy Arguments Against Expanding the Definition of "Insurance" to include specified self-insurance pools:

- ❑ **May drive up the cost of premiums for local governments.**
- ❑ **Transfers authority from the Legislature and gives it to local governments.**

2. Require local governments to carry insurance.

Policy Arguments in Favor of Requiring Local Governments to carry Insurance:

- ❑ **Ensure that most local claims would be paid.**
- ❑ **Decrease the number of claim bills filed.**
- ❑ **Increase autonomy of local governments to settle claims.**
- ❑ **Benefits the insurance industry.**

Policy Arguments Against Requiring Local Governments to Carry Insurance:

- ❑ **Decreases the autonomy of local governments in general.**
- ❑ **Could be subject to challenge as an unfunded mandate.[36]**
- ❑ **May harm the self-insurance industry.**

3. Allow local governments to pay settled claims without legislative approval, regardless of insurance coverage.

Policy Arguments in Favor of Requiring Local Governments to Settle Claims Without Legislative Approval:

[36] Article VII, section 18 of the Florida Constitution provides that unless certain requirements are met, counties and municipalities are not bound by state laws requiring them to spend money or to take action that requires the expenditure of money. Unless one of numerous exemptions or exceptions apply, such bill requires a 2/3 vote of the membership of each chamber. A super-majority vote is not required if the bill is found to have an insignificant fiscal impact. If funds are appropriated to cover the mandate or the law applies to all similarly situated persons, and the Legislature formally determines the existence of an important state interest, the Legislature may treat the bill as it would any other measure, with a majority vote required for final passage. Detecting Constitutional Problems in Florida Legislation, published by the Civil Justice Council of the Florida House of Representatives, 2000, p. 153.

- **Gives local governments autonomy and flexibility to settle claims with local dollars.**

- **Reduces the number of claim bills.**

Policy arguments Against Requiring Local Governments to Settle Claims Without Legislative Approval:

- **Reduces legislative control over public funds.**

- **May allow or encourage corruption or fraud.**

4. **Devise an administrative payment schedule for specified injuries and send all settled claims through an executive-branch claims adjustor. The Legislature would make a lump-sum appropriation to fund all claims approved by the adjustor.**

Policy Arguments in Favor of an Executive Branch claims adjustor:

- **Expeditious resolution of claims.**

- **Fair and consistent treatment of claimants.**

- **Decrease number of claim bills filed.**

Policy arguments Against an Executive Branch claims adjustor:

- **One-size-fits-all approach may not be equitable for all claimants.**

- **Difficulty in determining the schedule for payment (i.e., how much is permanent brain damage worth? How is the claimant's remaining life expectancy taken into account?)**

- **Loss of legislative control.**

- **Creates another government bureaucracy.**

Settled claims against state agencies (general claims):

A general law is an act intended to have statewide application.[37] For claim bill purposes, if the respondent of the claim is a state agency, which situation would require an appropriation from the state's general revenue or from an executive agency's budget, then the claim bill is a general bill. General revenue is made up of state tax revenues and is available to the Legislature for any use; these are the revenues for which programs compete for funding.

There is frequent confusion about the source of funding for general claim bills. This confusion can generally be cleared by looking closely at the funding language of the bill. If the funds are intended to come from general revenue, then the bill language should read

[37] *See* "The Language of Lawmaking in Florida IV," compiled by John Phelps and the staff of the Office of the Clerk of the House, 1998.

that funds "are appropriated from general revenue." If the funds are intended to come out of the agency's budget, then the bill language should require the specific department to request transfer of existing spending authority from existing operating categories of the department. While such language is generally suggested as a punitive measure against a department, historically there have been policy considerations against requiring today's department to pay for yesterday's negligence occasioned by employees and leadership from previous administrations. Such policy also has the possibility of taking funds and/or services away from citizens who are not responsible for the negligence.

The State of Florida Risk Management Trust Fund has been created within the Department of Financial Services to provide insurance to state agencies for general liability, among other things.[38] The trust fund covers all departments of the State and their employees, agents, and volunteers for general liability, subject to the sovereign immunity caps and limitations provided by statute.[39] Premiums for each department are computed on a retrospective rating arrangement based upon actual losses accruing to the fund, taking into account reasonable expectations, the maintenance and stability of the fund, and the cost of insurance.[40]

Trust Funds: Trust funds are monies that are earmarked by law for very specific purposes and held in trust. Specifically, a trust fund bill sets up a special account into which certain taxes or fees are deposited and out of which funds are disbursed for a specific and exclusive purpose.[41] The Legislature typically has little discretion in allocation of trust fund dollars among programs, and occasionally uses trust fund monies to fund claim bills.[42]

Policy Options Regarding Settled Claims Against State Agencies:

1. **Increase the statutory caps for claims against state agencies, but maintain current caps for local governments. See policy arguments in section entitled "Statutory Caps on Liability", on page 5.**

Application of Statutory Limit on Attorney's Fees to Lobbying Fees

Florida law provides that no attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25% of any judgment or settlement of a tort claim against the government.[43] The Florida Supreme Court has upheld the Legislature's authority to limit attorney's fees in a claim bill, despite the fact that the attorney had contracted for a higher amount.[44] Furthermore, the Florida Supreme Court has determined that the statutory 25% limitation on attorneys' fees applies to all situations involving waiver of sovereign immunity, whether it be the underlying \$100,000/\$200,000 cap, or the excess part awarded by the

38 *See* s. 284.30, F.S.
39 *See* ss. 284.31 and 768.28, F.S.
40 *See* s. 284.36, F.S.
41 *See* "The Language of Lawmaking in Florida IV."
42 The Department of Transportation has a trust fund out of which tort liability and settlements are paid. *See* s. 206.46, F.S.
43 Section 768.28(8), F.S.
44 Gamble v. Wells, 450 So.2d 850 (Fla. 1984), holding that the limitation of attorney fees did not constitute an impairment of the right to contract protected by Article 1, section 10 of the Florida Constitution.

claim bill; or the result of a settlement and voluntary payment in any amount made by a governmental respondent or by its insurance carriers.[45]

While lobbyists' fees are not restricted by state law, Governor Jeb Bush has adopted a policy that the payment of fees to the attorney and the lobbyist(s) should be inclusive of all expenses, and that payment should not exceed a combined total of 25% of the judgment or settlement amount paid.[46] The Governor requires claimant's attorneys and lobbyists to sign a letter of agreement with the policy; failure to execute said letter may result in a veto of the claim bill. It is important to note that the Legislature is not bound by the Governor's policy. An attempt to codify the inclusion of lobbyists' fees within the 25% limitation on attorneys' fees failed during the 2005 legislative session.[47] Also note that fees contingent upon the outcome of any specific legislative action are generally prohibited, except in the case of claim bills.[48]

A strong argument can be made that lobbyists' fees could be limited by the Legislature, similar to the limitation on attorneys' fees. There are several available policy options:

Policy Options Regarding Lobbying Fees:

1. **Address lobbying fees on a case-by-case basis**

    Policy Arguments in Favor of Addressing Lobbying Fees on a Case-by-Case Basis:

    - ❑ **The approach has been upheld by the Florida Supreme Court in regards to attorneys' fees.**

    - ❑ **Gives the Legislature the maximum amount of flexibility in determining equity.**

    Policy Arguments Against Addressing Lobbying Fees on a Case-by-Case Basis:

    - ❑ **Might allow decisions based on politics rather than equities.**

2. **Prohibit contingency fees for lobbying claim bill cases.**

    Policy Arguments in Favor of Prohibiting Contingency Fees:

    - ❑ **Mitigates against windfall payments to lobbyists.**

    Policy Arguments Against Prohibiting Contingency Fees:

    - ❑ **May result in payments to lobbyists by claimants even when their claim fails.**

3. **Limit lobbying fees to a certain percentage, or require inclusion within the attorneys' fee limitation.**

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[45] Ingraham v. Dade County School Board, 450 So.2d 847 (Fla. 1984), holding that section 768.28(8), F.S. does not amount to a legislative usurpation of the power of the judiciary to regulate the practice of law.
[46] Governor Bush's Claim Bill Policy, updated 1/10/05.
[47] HB 703/SB 882 (2005).
[48] Sections 11.047 and 112.3217, F.S.

Policy Arguments in Favor of Limiting Lobbying Fees:

- ❑ **Mitigates against windfall payments to lobbyists.**
- ❑ **Allows the claimant to keep more of the award.**
- ❑ **Discourages the filing of unmeritorious claims.**

Policy Arguments Against Limiting Lobbying Fees:

- ❑ **May deter attorneys from taking cases against government entities, if lobbying fees must be included in the 25% limitation on attorneys' fees.**[49]

4. **Prohibit lobbying fees.**

Policy Arguments in Favor of Prohibiting Lobbying Fees:

- ❑ **Allows the claimants to keep more of the award.**
- ❑ **Mitigates against awards based on politics.**
- ❑ **Discourages the filing of unmeritorious claim bills.**

Policy Arguments Against Prohibiting Lobbying Fees:

- ❑ **Unless the current system is streamlined, may result in passage of fewer meritorious claim bills.**
- ❑ **Promotes equal opportunity and fairness in representation before the Legislature.**

5. **Require that sponsors of claim bills be located in the same jurisdiction as either the claimant or the respondent.**

Policy Arguments in Favor of Jurisdictional Limits:

- ❑ **Indicates that the local delegation is in favor of the claim.**
- ❑ **Encourages decisions based on equities rather than politics.**

Policy Arguments Against Jurisdictional Limits:

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[49] Attorneys fees for cases against non-government defendants are limited by rule 4-1.5(B) of the Florida Bar as follows: before an answer is filed, an attorney may be compensated 33 1/3% of any recovery up to $1M; plus 30% of any recovery between $1 and $2M; plus 20% of any portion of the recovery exceeding $2M. After an answer is filed, an attorney is permitted to collect 40% of any recover up to $1M; plus 30% of any recovery between $1M and $2M; plus 20% of any recovery over $2M. For purposes of comparison, an attorney who wins a $2M judgment against a government defendant may collect $500,000 in fees; if the judgment was against a non-government defendant, the attorney could collect $700,000 in fees. If lobbying fees must be included within the 25% limitation, the attorney's portion grows even smaller. Also note that Amendment 3 to the State Constitution passed in the 2004 general election, providing that an injured claimant who enters into a contingency fee agreement with an attorney in a claim for medical liability is entitled to no less than 70% of the first $250,000.00 in all damages received by the claimant, and 90% of damages in excess of $250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. This amendment is intended to be self-executing.

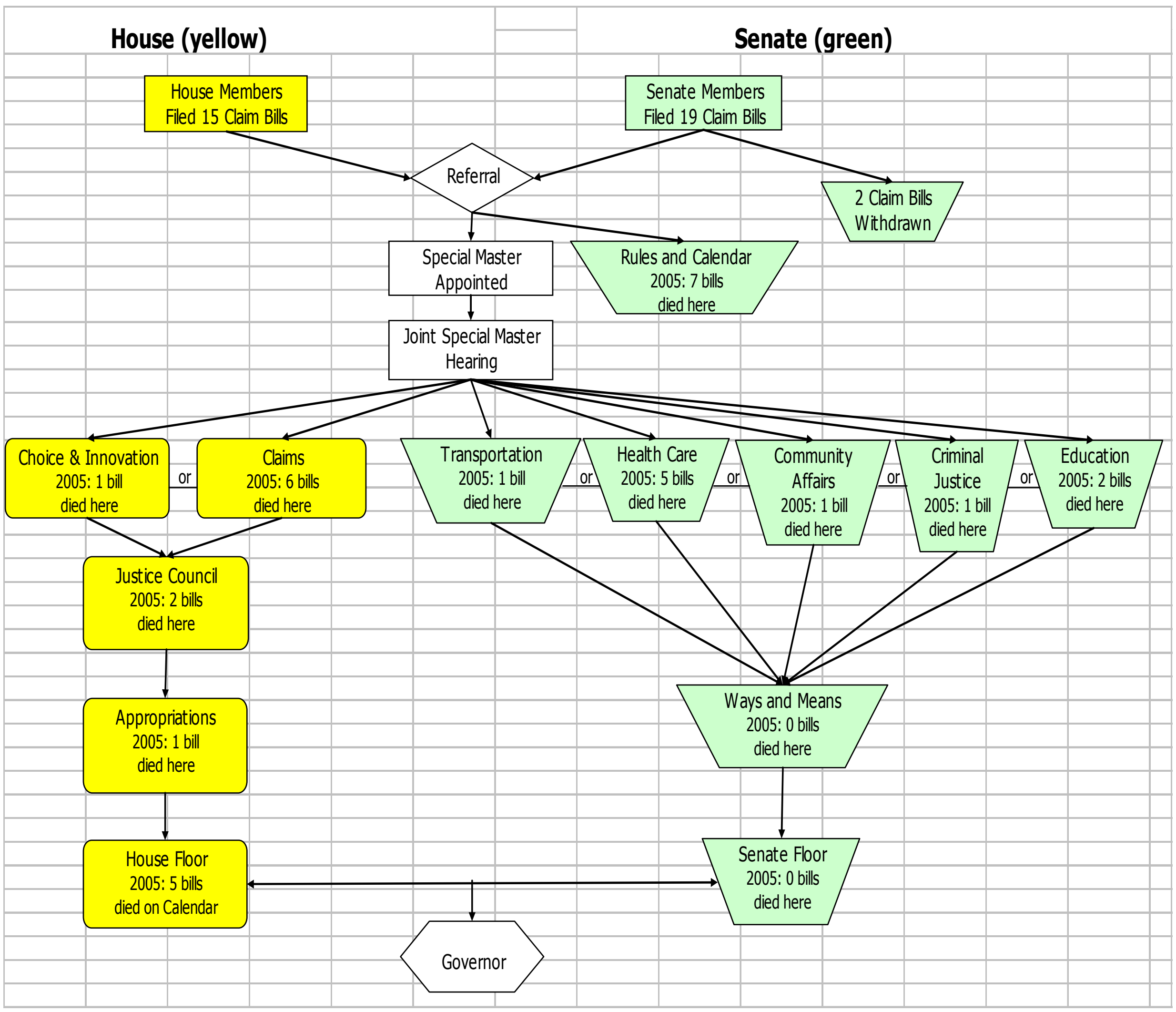
- **Limits the flexibility of the claimants and gives respondents more power.**

- **Claimants who are represented by Members who refuse to file claim bills may be without access to the claim bill process.**

Consideration of a Joint Claim Policy

As the attached flow chart demonstrates, the current system for handling claim bills includes a multitude of legislative decisions, each of which is an opportunity for a lobbyist to make a difference in the outcome of a claim bill.

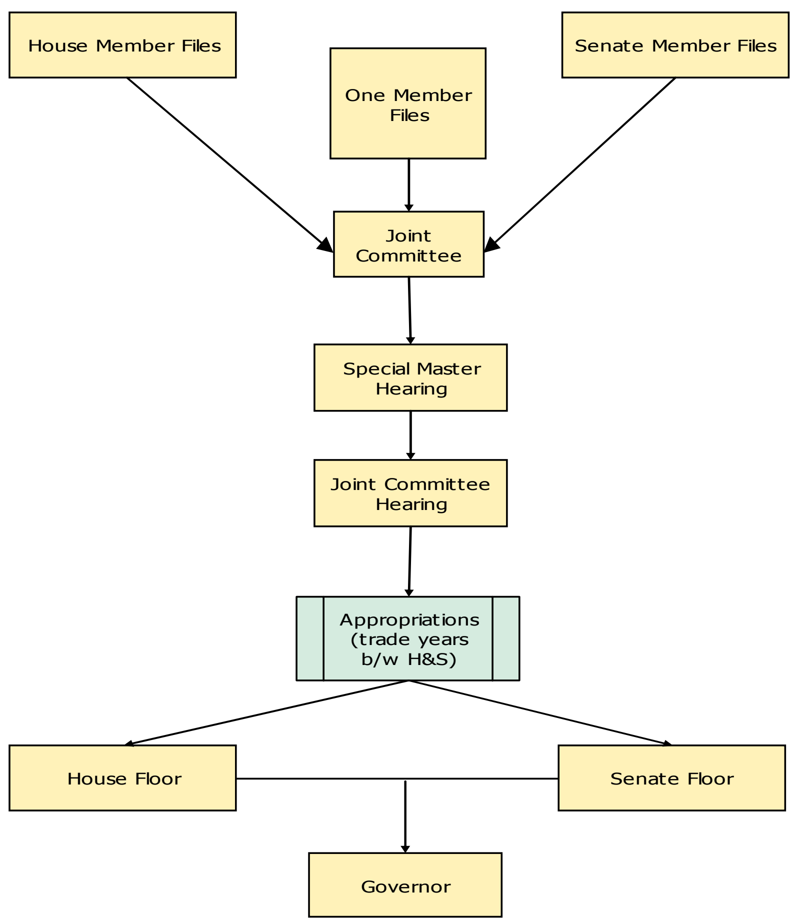
2005 Claim Bill Process



The current legislative scheme results in the perception that more lobbying is required, not less, and punishes deserving claimants in an effort to curtail perceived inequities by lobbyists.

As an alternative, consider a process that retains legislative authority over the award of claims, but simplifies the process by deleting some of the duplicative and complex legislative decision-making requirements. The adoption of a joint rule regarding claim bills that provided for the appointment of one special master, who would hold one hearing, followed by consideration of one joint committee, and then passage by each chamber would significantly decrease the need for lobbyists, while retaining legislative authority and control. Such a process would maximize the net award to the claimant.

Unified Claim Bill Process



Conclusion

It would appear that the "bad rap" attributed to the claim bill process may not be wholly justified. For the most part, the Special Master process provides an objective and fair vetting of claims against government entities, in which only the deserving claimants advance. Statistics show that claims which are settled by local governments and paid by local dollars have the highest passage rate. Claims which have been neither settled nor have had all judicial remedies exhausted (equitable claims) have the lowest passage rate. These statistics portray what appears to be sound policy: the Legislature views with a skeptical eye those claims that compete for general revenue dollars (general claims), particularly those not already considered by the Judicial branch.

Legislative concern regarding the political nature of the claim bill process and the attempt to maximize the percentage of the award received by the actual claimant is squarely within legislative control. There are several policy options available, including limiting lobbyists' fees and streamlining the process to minimize the need for outside advocacy. The Members might also choose to place more reliance on the recommendations made by the Special Master: a recommendation made by objective legislative staff who have nothing to gain or lose in the process.

In considering policy options concerning the claim bill process, the Legislature should be mindful of the delicate balance between maintaining legislative control, acknowledging the independence of local governments, and providing a fair process for those injured by the negligence of government employees or agents.

Appendix A

Comparison of House and Senate Rules Regarding Treatment of Claim Bills

Issue	House Rule	Senate Rule	Policy Options
Filing Deadline	Rule 5.2: must be approved for filing with the Clerk no later than noon on the first day of regular session. (March 7, 2006).	Rule 4.81(2): All claim bills shall be filed with the Secretary of the Senate on or before August 1 in order to be considered by the Senate, except that newly elected members have 60 days from the date of the election. The Senate shall not consider a House claim bill without a timely filed Senate companion. (August 1, 2005).	
Limit on Number of Bills	Rule 5.3(a): A member may not file more than six bills for a regular session. Rule 5.3(b): Local claim bills do not count toward this limit.	None.	• Consider requiring the sponsor to be from the district of either the claimant or respondent.
Appointment of Special Master	Rule 5.6(a): The Speaker may appoint a Special Master to review a claim bill or conduct a hearing if necessary.	Rule 4.81(3): If the President determines that a de novo hearing is necessary to determine liability, proximate cause, or damages, a Special Master shall conduct a hearing…	
Special Master report deadline	Rule 5.6(a): The Special Master may prepare a final report containing findings of fact, conclusions of law, and recommendations.	Rule 4.81(3): The Special Master shall … prepare a final report containing findings of fact, conclusions of law, and recommendations no later than December 1.	
Treatment of stipulations between parties	Rule 5.6(b): Stipulations entered into by the parties are not binding on the Special Master or the House or its councils or committees.	Rule 4.81(5): Stipulations entered into by the parties are not binding on the Special Master, the Senate or its committees.	House and Senate Rules are virtually identical.

Conditions precedent	Rule 5.6(c): The hearing and consideration of a claim bill shall be held in abeyance until all available administrative and judicial remedies have been exhausted, except when there is a written settlement agreement.	Rule 4.81(6): The hearing and consideration of a claim bill shall be held in abeyance until all available administrative and judicial remedies have been exhausted; except where there is a written settlement agreement.	House and Senate Rules are virtually identical.
Referral to Committees	Rule 6.2(a): Bills, upon filing or introduction, shall be referred by the Speaker to a committee and its council and such other committees as are deemed appropriate or to the Calendar of the House. Rule 6.5: All bills carrying or affecting appropriations or tax matters shall be referred to an appropriate fiscal committee. Rule 7.1(b)(5): The Claims Committee is established within the Justice Council.	Rule 4.6(1): All bills shall be referred by the President to appropriate committees. Rule 4.8: All bills authorizing or substantially affecting appropriations or tax revenue shall be reviewed by the Committee on Ways and Means or any other appropriate committee.	House and Senate Rules are virtually identical except that the Senate does not have a Claims Committee but instead appears to refer claim bills to the substantive committee with jurisdiction over the subject matter or the governmental entity involved.